

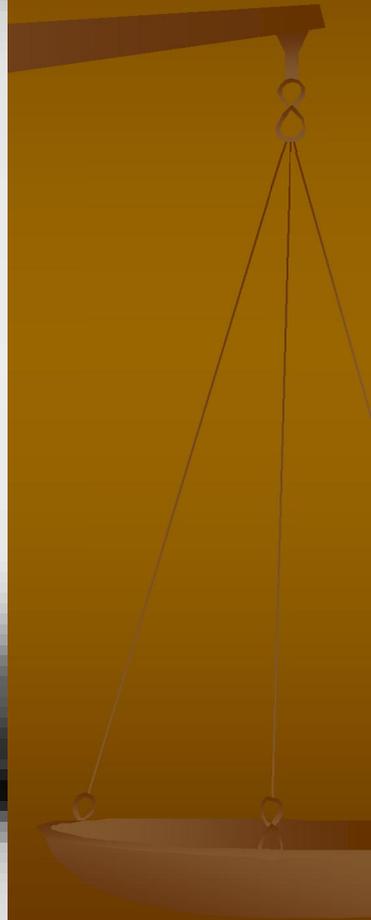
Confrontation After Crawford

John Rhodes

Assistant Federal Defender

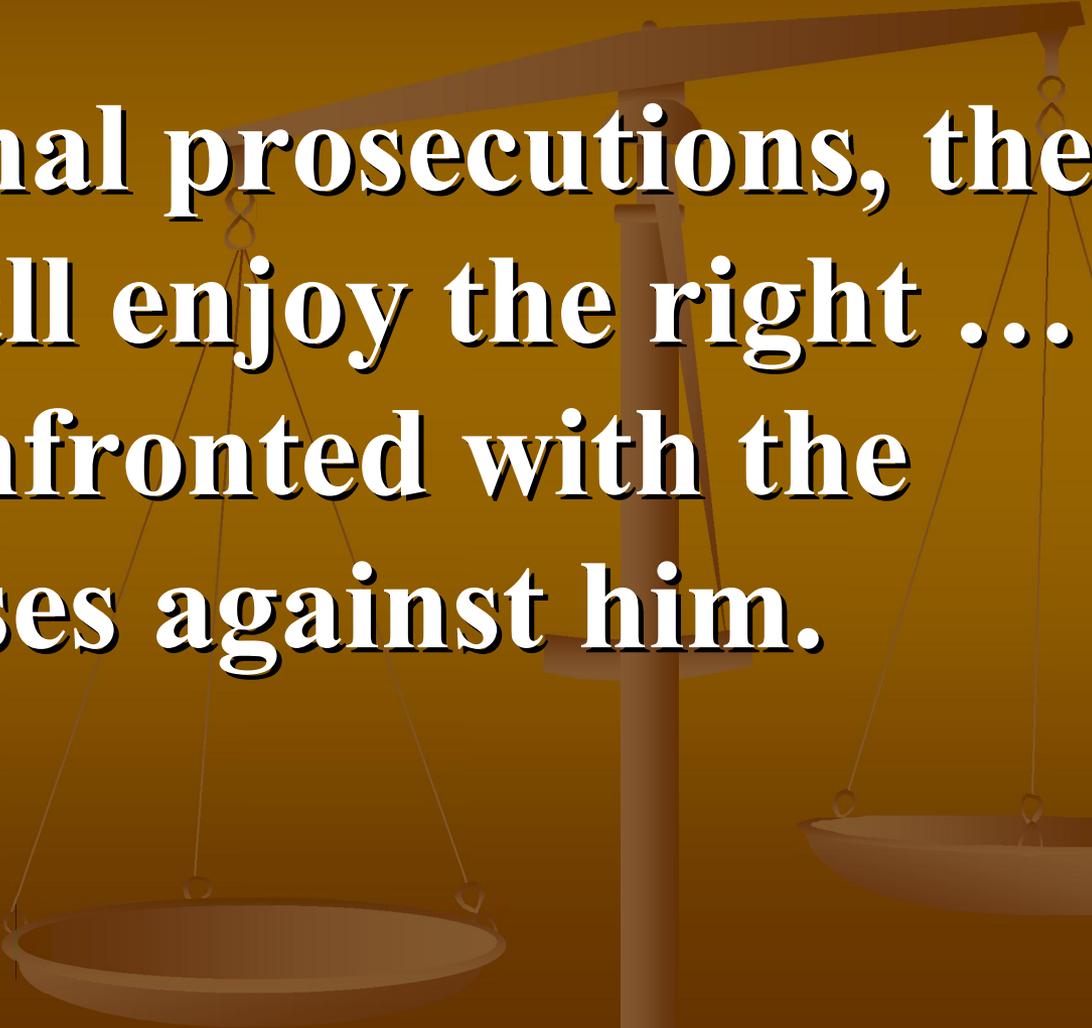
Federal Defenders of Montana





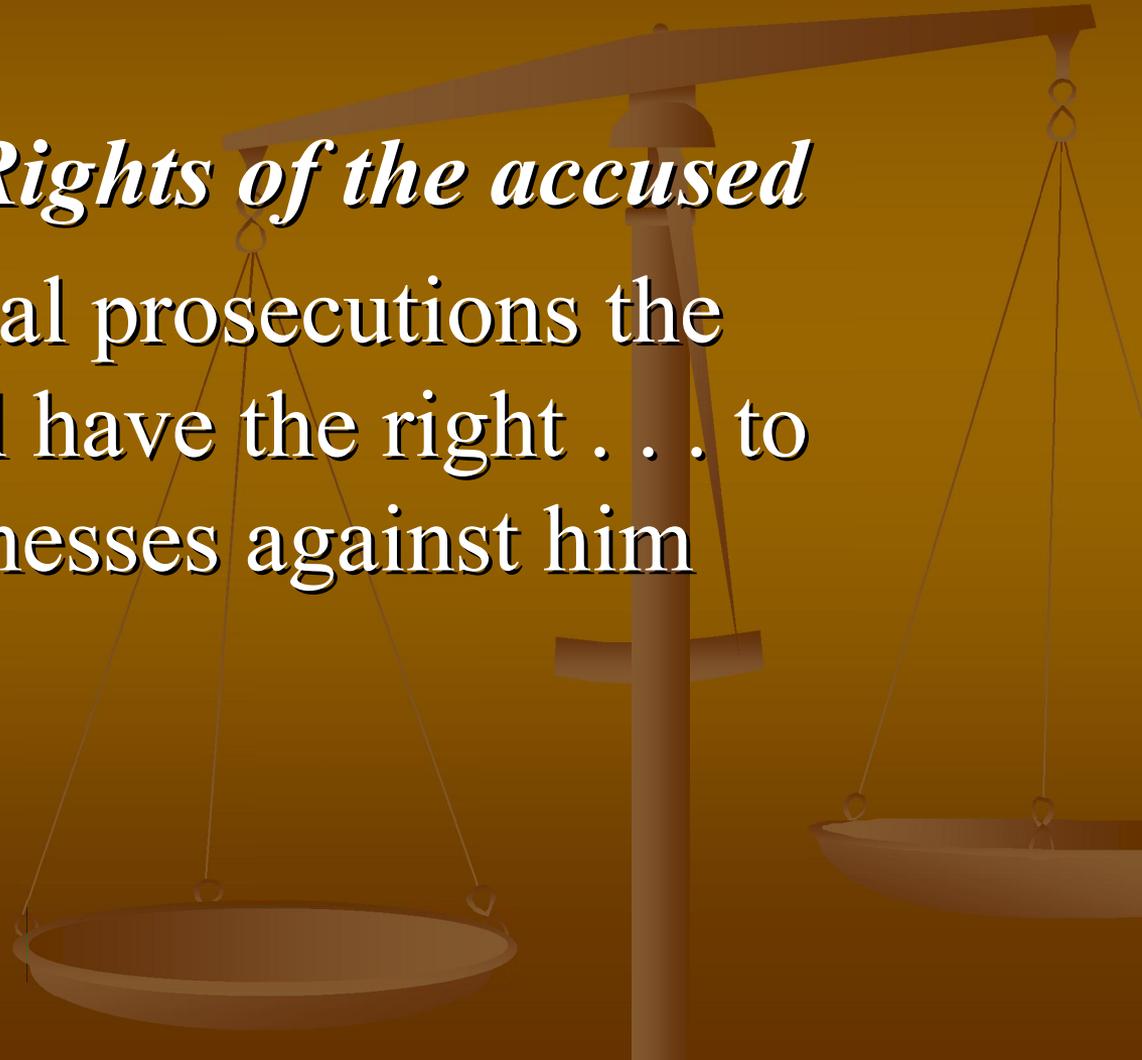
The Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.



Montana Constitution

- Article II
- Section 24. *Rights of the accused*
- In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face



Confrontation *Before*

Crawford:

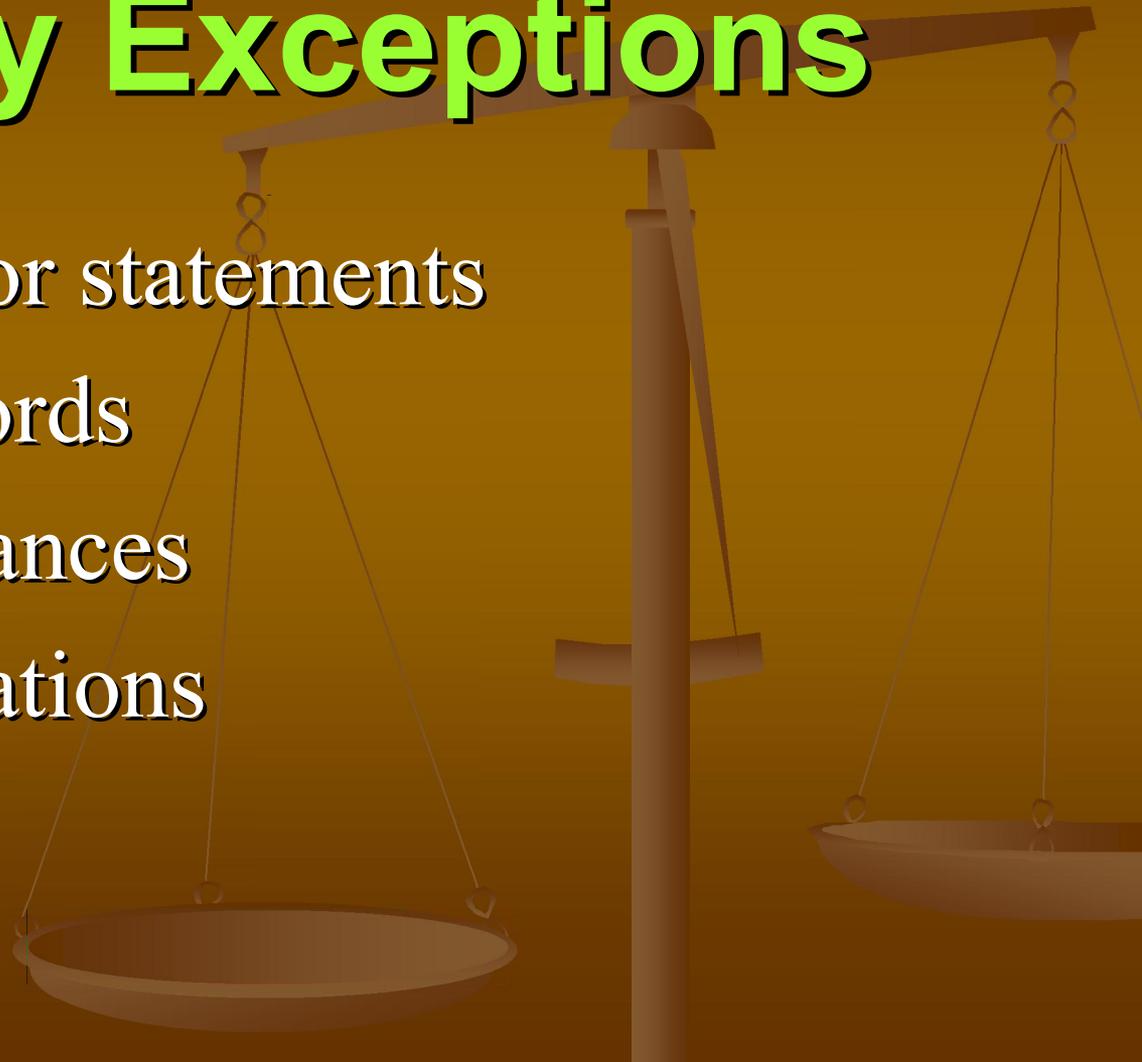
Ohio v. Roberts, 448 U.S. 56 (1980)

Unavailable witness's statement may be admitted if it bears "adequate indicia of reliability."

To meet that test, the evidence must either fall within a "firmly rooted hearsay exception" *or* bear "particularized guarantees of trustworthiness."

“Firmly Rooted” Hearsay Exceptions

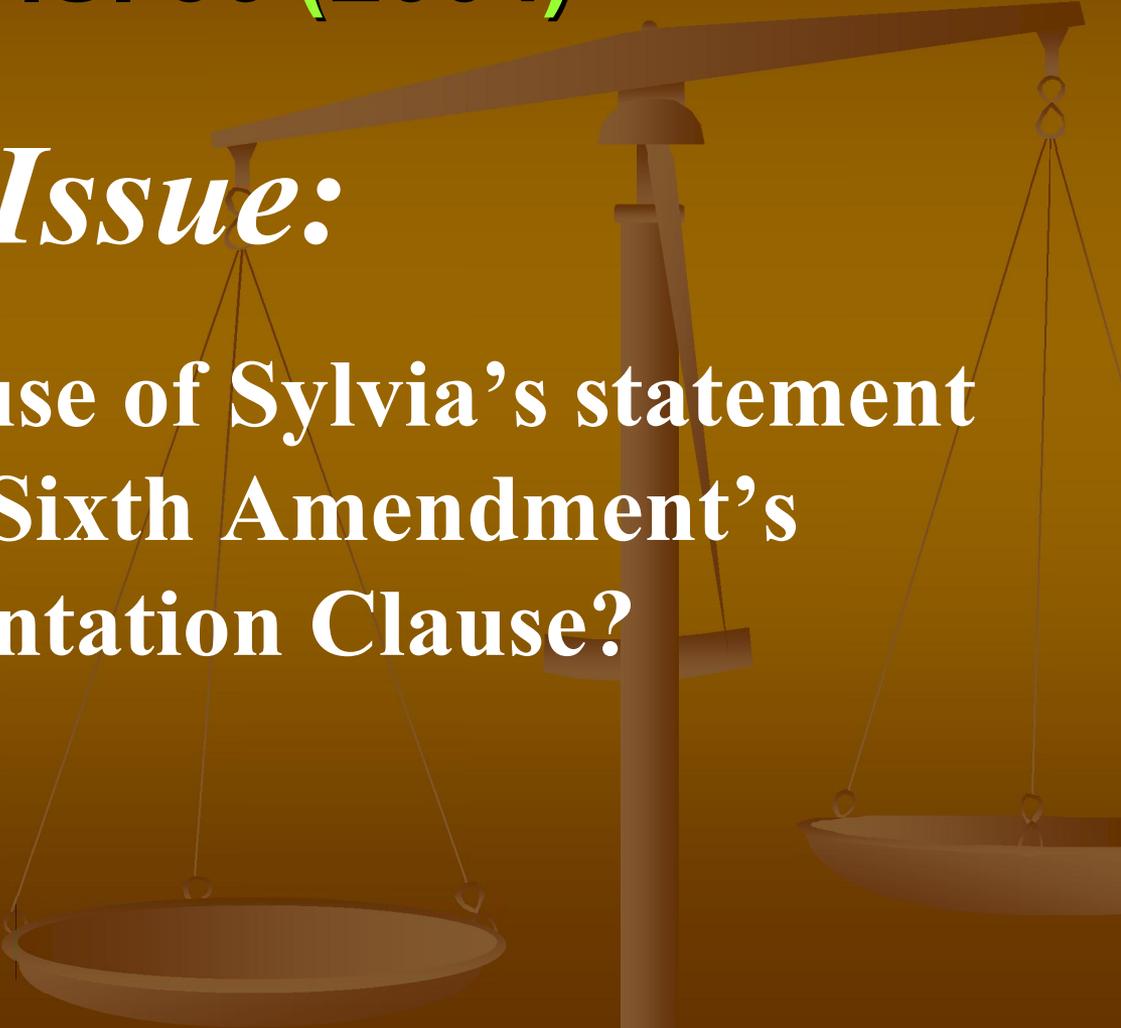
- co-conspirator statements
- business records
- excited utterances
- dying declarations



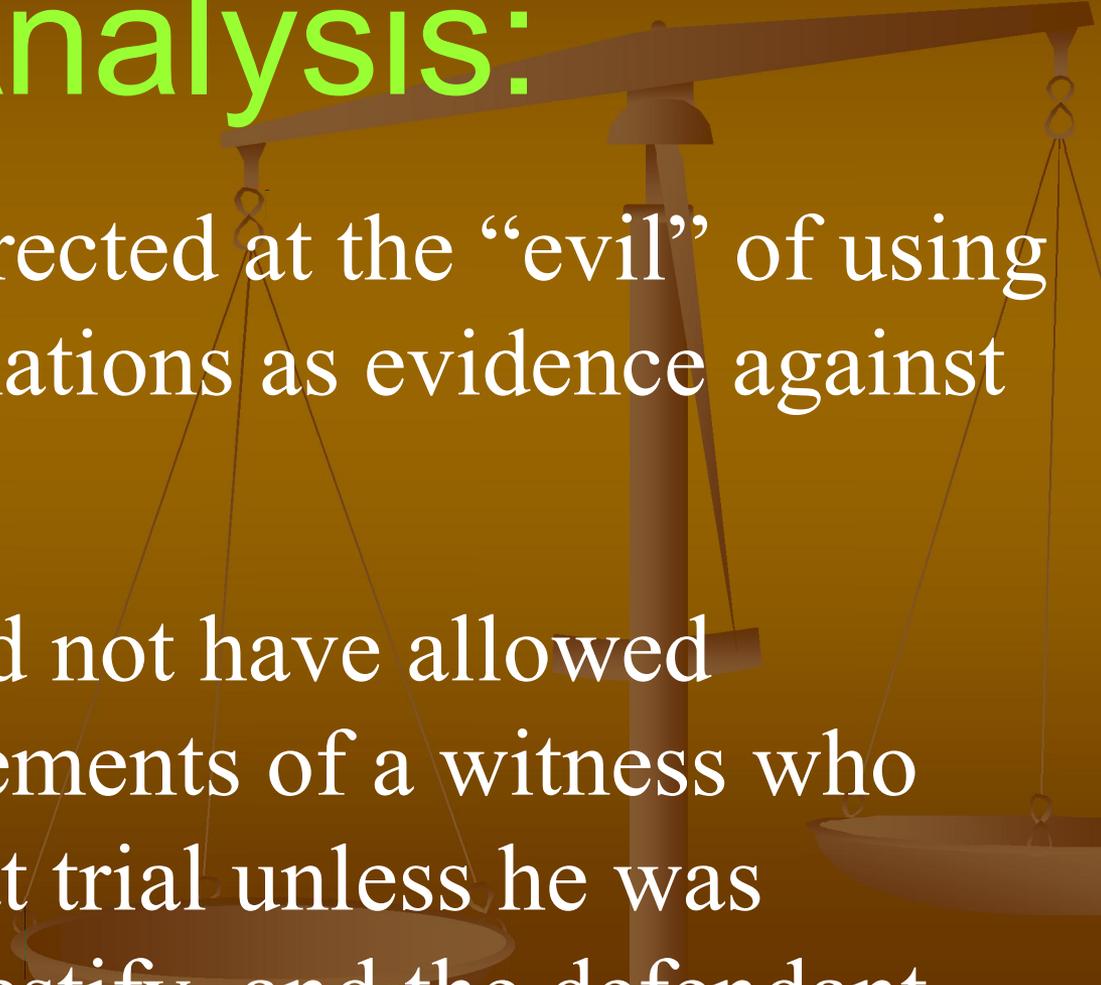
Crawford v. Washington, 541 U.S. 36 (2004)

Issue:

Did the state's use of Sylvia's statement violate the Sixth Amendment's Confrontation Clause?



Justice Scalia's Analysis:



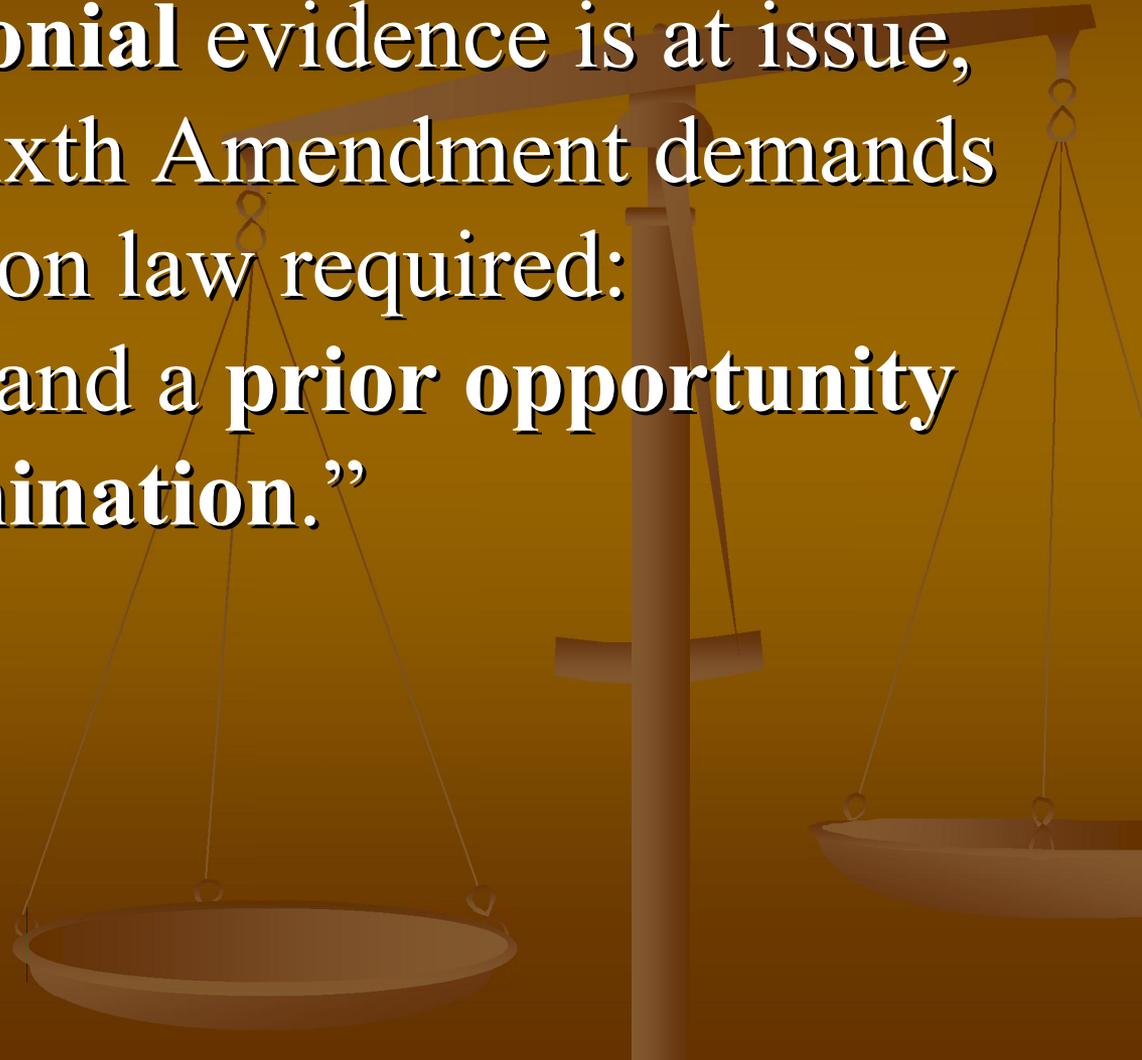
- (1) Clause was directed at the “evil” of using *ex parte* examinations as evidence against the accused
- (2) Framers would not have allowed testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant

Crawford's Holding

- “Where nontestimonial hearsay is at issue, it is wholly inconsistent with the Framers’ design to afford the States flexibility in the development of hearsay law – as does [Ohio v. Roberts], and as would an approach that exempted such statements from the Confrontation Clause altogether.”

Crawford's Holding

- “Where **testimonial** evidence is at issue, however, the Sixth Amendment demands what the common law required: **unavailability** and a **prior opportunity for cross-examination.**”



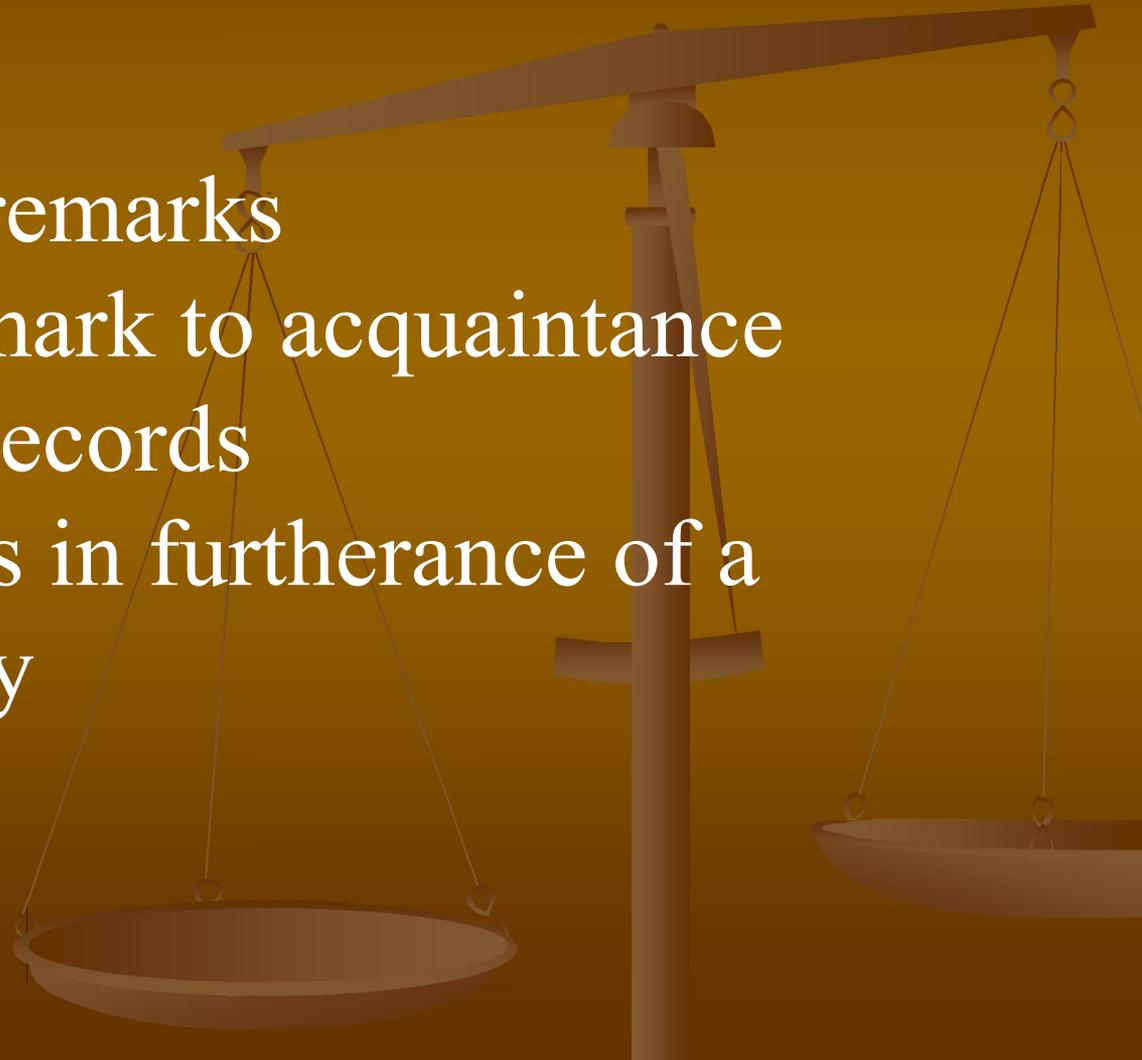
? What is

- ✓ **“testimonial”** prior testimony: preliminary hearing, grand jury, deposition, former trial
- ✓ ex parte affidavits
- ✓ police interrogations
- ✓ guilty pleas

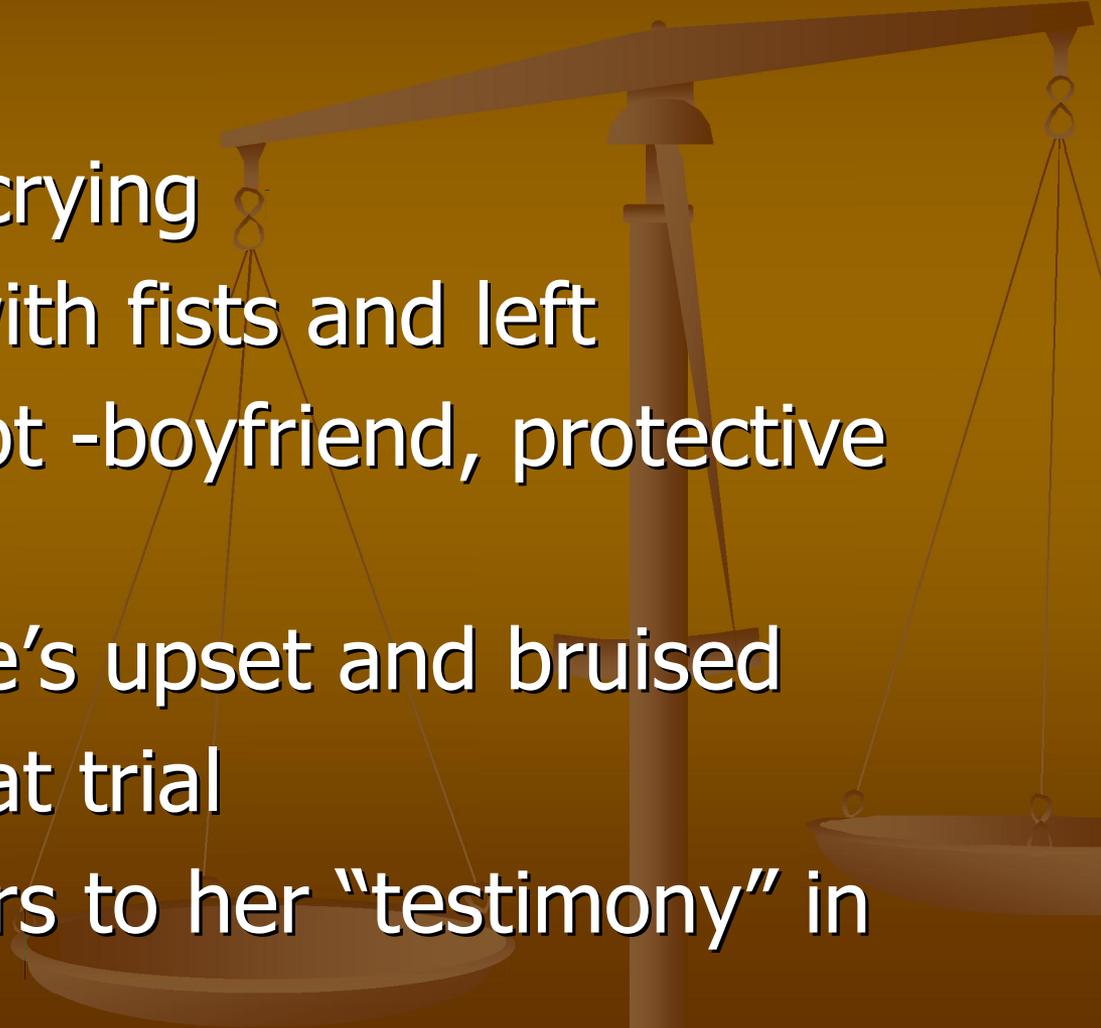


? What is NOT “testimonial”

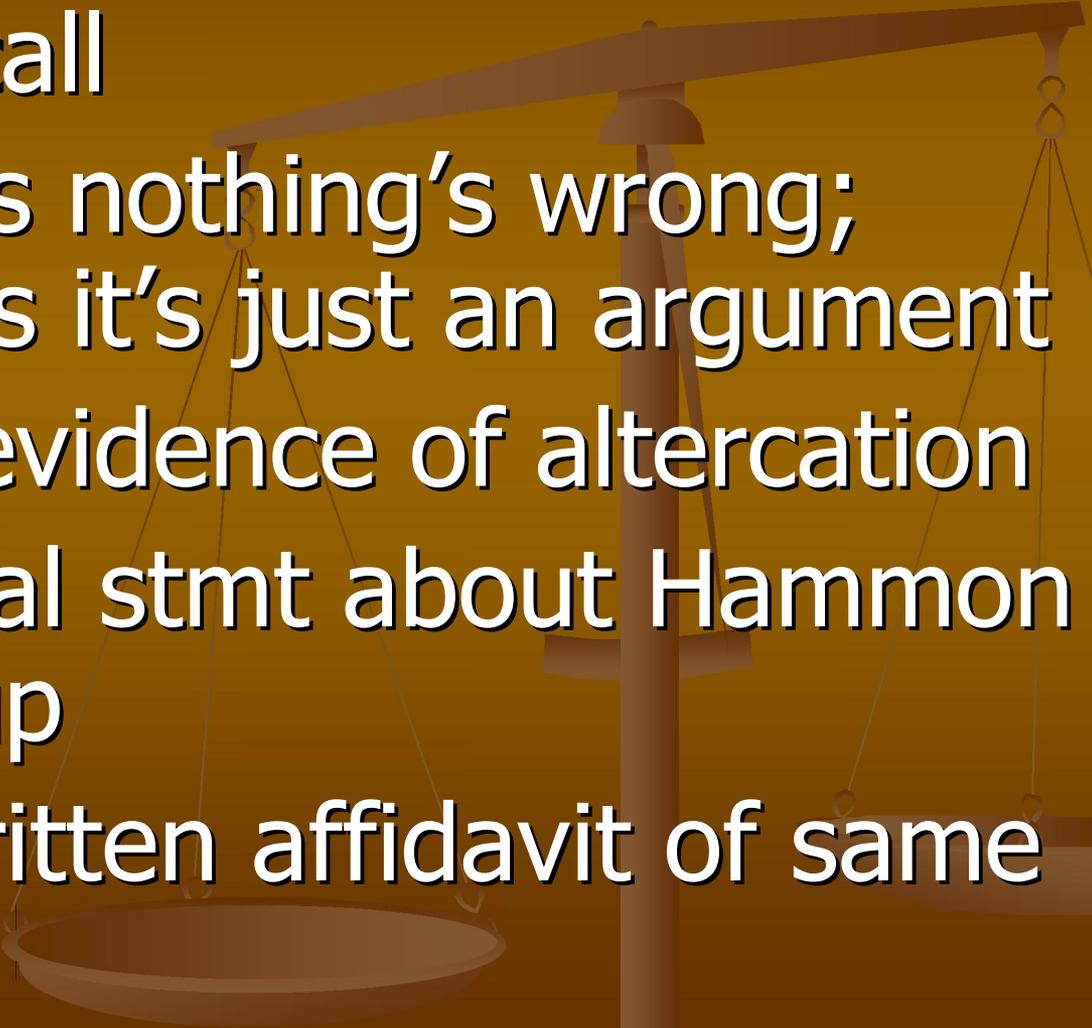
- X off-hand remarks
- X casual remark to acquaintance
- X business records
- X statements in furtherance of a conspiracy



Davis v. Washington, 126 S.Ct. 2266 (2006)

- 911 Call
 - Hysterical and crying
 - Man beat her with fists and left
 - Dispatcher script -boyfriend, protective order
 - Cops arrive, she's upset and bruised
 - Doesn't testify at trial
 - Prosecutor refers to her "testimony" in argument
- 

Hammon Facts

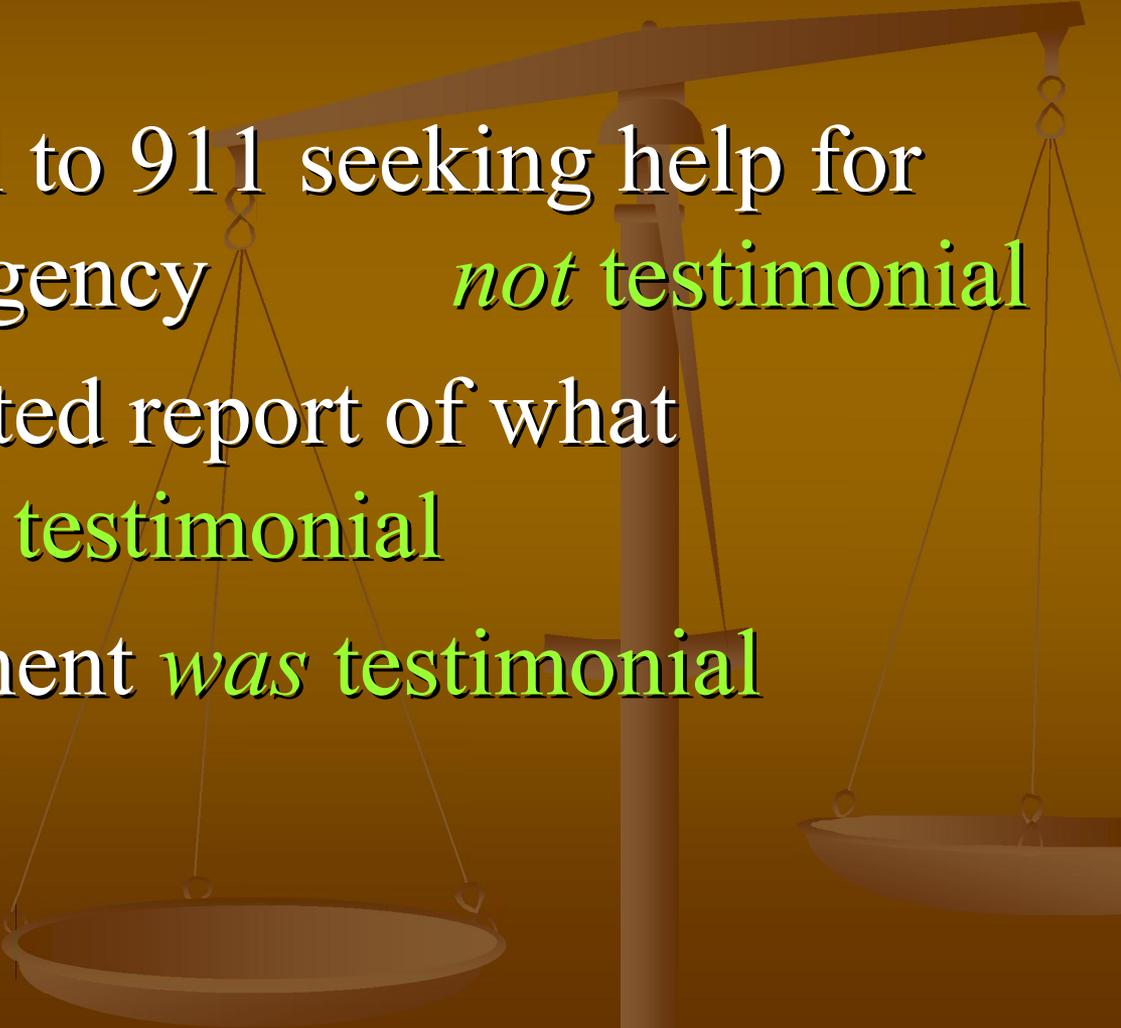
- Officer responds to domestic disturbance call
 - Amy first says nothing's wrong; Hammon says it's just an argument
 - Officer sees evidence of altercation
 - Amy gives oral stmt about Hammon beating her up
 - Amy gives written affidavit of same
- 

Davis v. Washington,

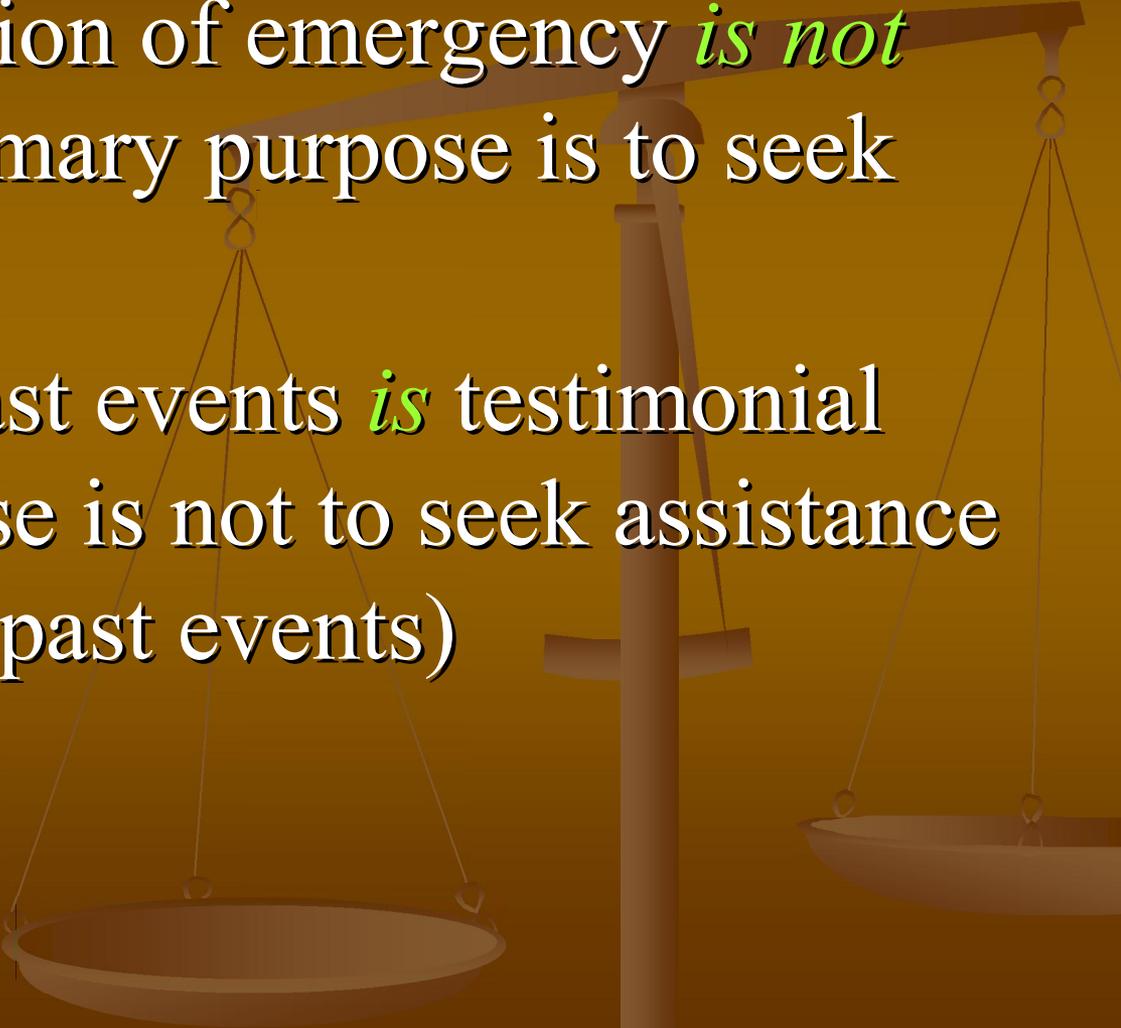
126 S.Ct. 2266 (2006)

- Testimonial or not?
 - Statements *are not* testimonial if circumstances **objectively indicated** the **primary purpose** was to seek assistance in an ongoing emergency.
 - Statements *are* testimonial if their **primary purpose** is to establish past events relevant to criminal prosecution.
- Non-testimony may evolve into testimony

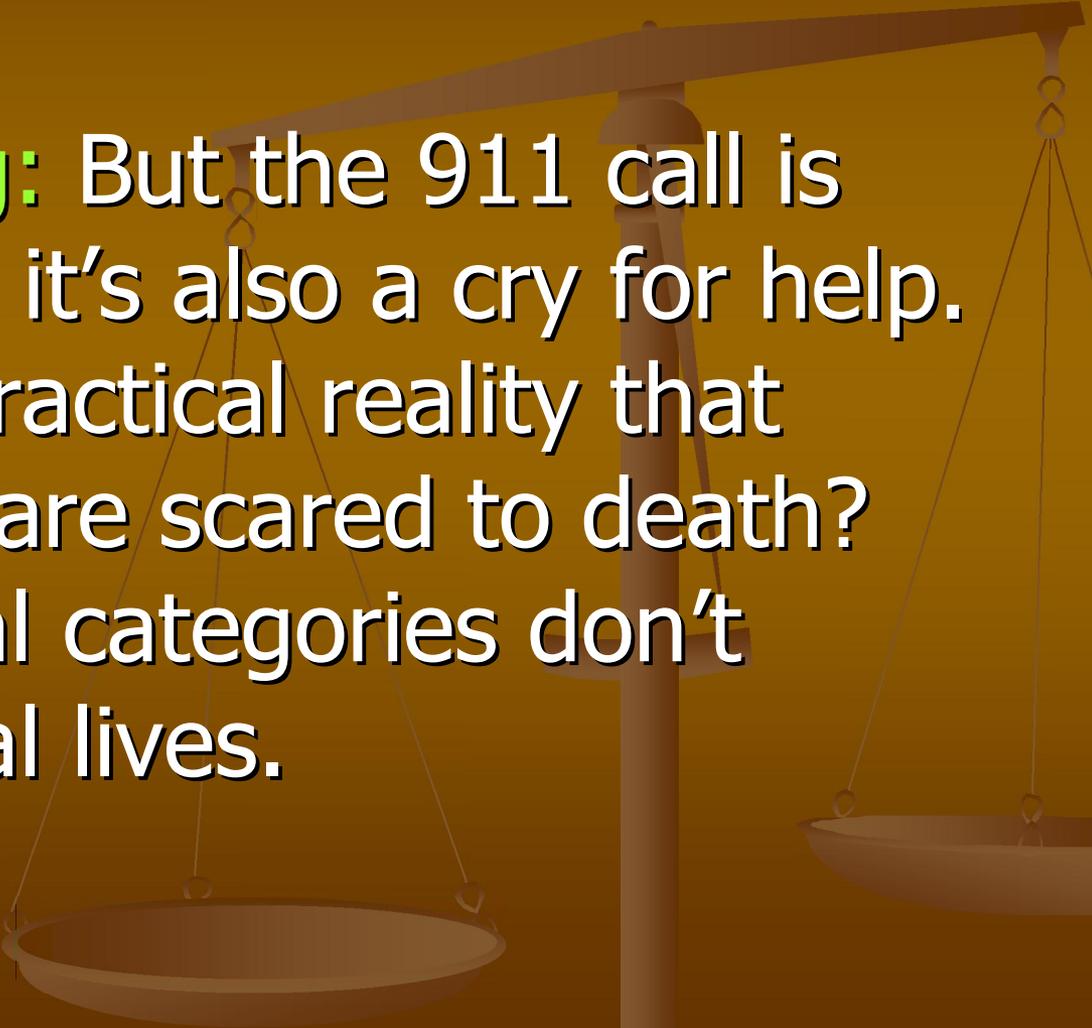
Davis Applied

1. Hysterical call to 911 seeking help for ongoing emergency *not testimonial*
 2. On scene excited report of what happened *was testimonial*
 3. Written statement *was testimonial*
- 

Essential Holdings in Davis

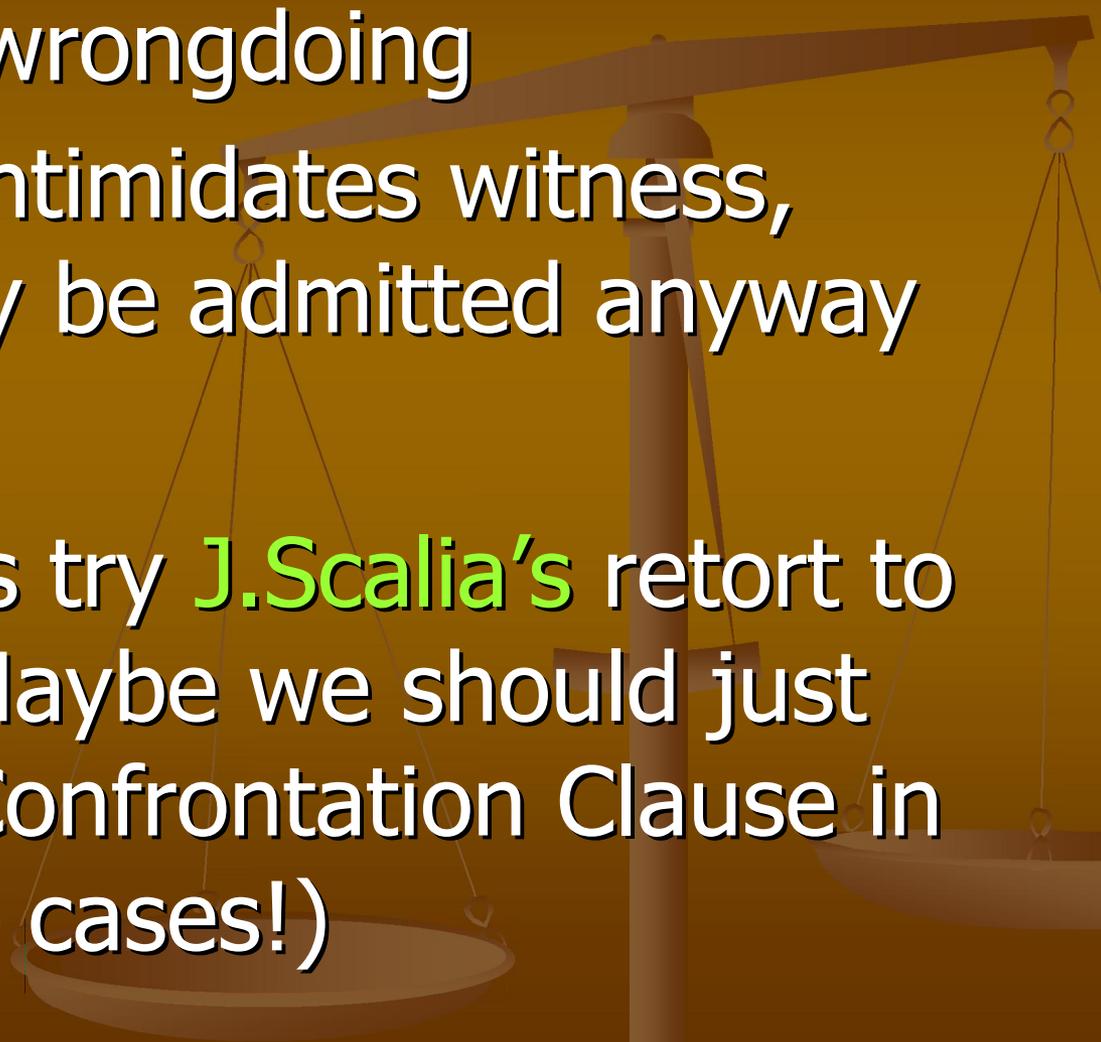
- Ongoing recitation of emergency *is not* testimonial (primary purpose is to seek assistance)
 - Recitation of past events *is* testimonial (primary purpose is not to seek assistance but to establish past events)
- 

Potential Domestic Abuse Exception



Justice Ginsburg: But the 911 call is not just a call, it's also a cry for help. Was it not a practical reality that many women are scared to death? Your neat legal categories don't conform to real lives.

Potential Domestic Abuse Exception



- Forfeiture by wrongdoing
- If defendant intimidates witness, testimony may be admitted anyway

(You can always try **J.Scalia's** retort to **J.Ginsburg**: Maybe we should just suspend the Confrontation Clause in spousal abuse cases!)

Object Object Object

And *Constitutionalize* Your
Objection!!!

